

A **MALAYAN BANKING BHD v. CHARANJEET KAUR KANG
SUKHBIR SINGH & ANOR**

COURT OF APPEAL, PUTRAJAYA
ZAHARAH IBRAHIM JCA
ABDUL AZIZ ABDUL RAHIM JCA

B ROHANA YUSUF JCA
[CIVIL APPEAL NO: W-02(NCVC)(W)-2695-12-2013]
14 MARCH 2016

C ***TORT: Conversion – Banker and customer – Customer opened and maintained foreign account with bank – Transacted money not debited from foreign account – Bank demanded for refund of overdrawn sum from customer – Customer failed to refund – Whether there was conversion of funds in account – Whether tort of conversion applied to money in banking account – Whether bank entitled to claim sum as money had and received***

D The appellant ('the plaintiff') was a bank while the respondents ('the defendants') were a legal firm. At the request of the defendants, the plaintiff agreed to grant and the defendants agreed to open, manage and maintain a EURO Foreign Account ('the FCA account'), for and on behalf of the defendants' client, ACC International FZE in the United Arab Emirates. On
E the defendants' instruction, the plaintiff transferred €162,373.50 ('the sum'), which was equivalent to RM639,787.83, from the FCA account to a company based in Abu Dhabi known as Emdad Company ('Emdad'). The transacted amount was not debited from the FCA account. The defendants made a number of transactions through the FCA account. The plaintiff was
F later informed by the Foreign RS Unit of Finance and Treasury Operations of the non-debit. In turn, the plaintiff communicated this to the defendants and demanded for a refund of the overdrawn sum but the defendants failed to make the refund. This prompted the plaintiff to commence an action at the High Court against the defendants, claiming for (i) the said sum based on
G the tort of conversion or alternatively, as money had and received; and (ii) the transfer out of the sum and the failure on its part to debit the FCA account with the equivalent amount constituted overcrediting of the account. In dismissing the plaintiff's claim, the High Court Judge ('the HCJ') held, *inter alia*, that (i) the plaintiff failed to discharge its burden of establishing the mistake of fact that it claimed was made in not debiting the sum transferred to Emdad; and (ii) there was no conversion of the funds in the FCA account as the tort of conversion only applied to goods and chattels – not to money in a banking account. Hence, the present appeal. The issues that arose for the court's determination were (i) whether the plaintiff had proven that the
H defendants had committed the tort of conversion of the sum which it did not
I debit from the FCA account upon such sum being transferred out of the

account; and (ii) whether the plaintiff was entitled to claim from the defendants the sum or its equivalent in Malaysian Ringgit as money had and received.

**Held (dismissing appeal with costs and affirming order of High Court)
Per Zaharah Ibrahim JCA delivering the judgment of the court:**

- (1) The HCJ referred to *OBG Limited and others v. Allan and others* ('*OBG Limited*'). In *OBG Limited*, it was held that the tort of conversion only applied to the misappropriation of chattels. The scope of the tort was not extended to choses in action or to the misappropriation of intangibles. The position on the tort of conversion, as decided in *OBG Limited*, was still the applicable legal position at the material time. There was no reason to disagree with the HCJ's finding that the tort of conversion did not apply to a claim against the defendants for the amount that the plaintiff failed to debit from the FCA account. (paras 50, 51 & 52)
- (2) The subject matter of the plaintiff's claim for conversion was the sum, not the sums involved in the subsequent transfers. The initial amount in the FCA account was not pleaded and nowhere was it stated at what point the FCA account was overdrawn and by how much. Therefore, the plaintiff failed to prove that the defendants had dealt with the plaintiff's property, being the sum, in a manner inconsistent with the plaintiff's rights. (paras 55, 56 & 57)
- (3) There was no mistake of fact; just mere carelessness/negligence. The sum was transferred to Emdad when there were sufficient funds in the FCA account. There was no mistake there. The subsequent payments were not the subject matter of the claim. The claim for money had and received could not stand against the defendants. (paras 60, 62 & 63)

Bahasa Malaysia Headnotes

Perayu ('plaintiff') adalah sebuah bank manakala responden-responden ('defendan-defendan') adalah satu firma guaman. Atas permintaan defendan-defendan, plaintiff bersetuju memberi dan defendan-defendan bersetuju membuka, menguruskan dan menyenggara akaun mata wang asing EURO ('akaun FCA'), bagi dan bagi pihak anak guam defendan-defendan, ACC International FZE di Emiriah Arab Bersatu. Bertindak mengikut arahan defendan-defendan, plaintiff memindahkan €162,373.50 ('jumlah tersebut'), bersamaan RM639,787.83, dari akaun FCA ke syarikat yang ditubuhkan di Abu Dhabi, yang dikenali sebagai Emdad Company ('Emdad'). Jumlah dalam transaksi tersebut tidak didebitkan dari akaun FCA. Defendan-defendan membuat beberapa transaksi dari akaun FCA. Plaintiff seterusnya dimaklumkan oleh Foreign RS Unit of Finance and Treasury Operations tentang kegagalan debit tersebut. Seterusnya, plaintiff memaklumkan ini kepada defendan-defendan dan menuntut pemulangan jumlah terlebih keluar

- A tersebut tetapi defendan-defendan gagal memulangkannya. Ini menyebabkan
plaintif memulakan satu tindakan di Mahkamah Tinggi terhadap defendan-
defendan, menuntut (i) jumlah tersebut berdasarkan tort konversi atau
alternatifnya, sebagai wang yang diperoleh dan diterima; dan (ii) pindahan
keluar jumlah tersebut dan kegagalannya mendebitkan akaun FCA dengan
B jumlah yang sama terjumlah sebagai pengkreditan terlebih akaun. Dalam
menolak tuntutan plaintif, Hakim Mahkamah Tinggi ('HMT') memutuskan,
antara lain, bahawa (i) plaintif gagal melepaskan beban membuktikan
kesalahan fakta yang didakwa dibuat dalam tidak mendebitkan jumlah yang
dipindahkan ke Emdad; dan (ii) tiada konversi terhadap jumlah dalam akaun
C FCA kerana tort konversi hanya terpakai pada barang-barang dan harta
peribadi – tidak pada wang dalam akaun perbankan. Maka timbul rayuan ini.
Isu-isu berbangkit bagi keputusan mahkamah adalah (i) sama ada plaintif
berjaya membuktikan defendan-defendan telah melakukan tort konversi
jumlah tersebut yang tidak didebitkan dari akaun FCA apabila jumlah
D tersebut dipindah keluar dari akaun; dan (ii) sama ada plaintif berhak
menuntut daripada defendan-defendan jumlah tersebut atau jumlah yang
bersamaan dengannya dalam Ringgit Malaysia sebagai wang yang diperoleh
dan diterima.

**Diputuskan (menolak rayuan dengan kos dan mengesahkan perintah
Mahkamah Tinggi)**

E **Oleh Zaharah Ibrahim HMR menyampaikan penghakiman mahkamah:**

- (1) Hakim Mahkamah Tinggi merujuk pada *OBG Limited and others v. Allan
and others* ('*OBG Limited*'). Dalam *OBG Limited*, diputuskan bahawa tort
konversi hanya terpakai pada penggelapan harta peribadi. Skop tort ini
F tidak diluaskan untuk meliputi hak-hak dalam tindakan atau
penggelapan aset tidak ketara. Kedudukan tort konversi, seperti yang
diputuskan dalam *OBG Limited*, adalah kedudukan bawah undang-
undang yang terpakai pada masa material. Tiada sebab untuk tidak
bersetuju dengan dapatan HMT bahawa tort konversi tidak terpakai pada
G tuntutan terhadap defendan-defendan bagi jumlah yang plaintif gagal
debitkan dari akaun FCA.
- (2) Hal perkara dalam tuntutan plaintif bagi konversi adalah jumlah
tersebut, bukan jumlah yang terlibat dalam semua pindahan
terkemudian. Jumlah asal dalam akaun FCA tidak diplidkan dan tidak
H dinyatakan pada peringkat mana akaun FCA terlebih keluar dan berapa
jumlahnya. Oleh itu, plaintif gagal membuktikan defendan-defendan
menjalankan urusan dengan hartanah plaintif, iaitu jumlah tersebut,
dengan cara yang tidak konsisten dengan hak-hak plaintif.

I

- (3) Tiada kesalahan fakta; cuma kecuaiian dan kelalaian. Jumlah tersebut dipindahkan ke Emdad apabila terdapat jumlah yang cukup dalam akaun FCA. Tiada kesalahan di sini. Bayaran-bayaran terkemudian bukan hal perkara dalam tuntutan. Tuntutan bagi wang yang diperoleh dan diterima terhadap defendan-defendan tidak boleh dipertahankan. A

Case(s) referred to:

Bank Bumiputra Malaysia v. Hashbudin Hashim [1998] 2 CLJ Supp 332 HC (*refd*)
Borneo Motors (S) Pte Ltd v. William Jacks & Company (S) Pte Ltd [1992] SGCA 47 (*dist*) B

Noel Kenneth Davidson v. Firm Corporation Sdn Bhd [1994] 2 CLJ 637 HC (*refd*)

OBG Ltd v. Alan [2007] UKHL 21 (*fol*)

Oriental Bank of Malaya v. Rubber Industry (Replanting) Board [1957] 1 LNS 50 HC (*not foll*) C

Soon Lee Huat Palm Oil Mill Sdn Bhd v. Stable Win Sdn Bhd [2013] 4 CLJ 640 CA (*refd*)

Syarikat Bekalan Air Selangor Sdn Bhd v. Liew Lai Yin [2010] 5 CLJ 222 HC (*refd*)

The Official Assignee Of The Property Of Loh Chuk Poh, A Bankrupt v. The Oversea Chinese Bank Ltd [1934] 1 LNS 77 HC (*refd*) D

Legislation referred to:

Civil Law Act 1956, s. 11

Contracts Act 1950, ss. 21, 71, 73

Rules of Court 2012, O. 42 r. 12

For the appellant - A Vishnu Kumar; M/s JS Pillay & Mohd Haaziq E

For the respondents - In person

[Editor's note: Appeal from High Court, Kuala Lumpur; Suit No: 22NCVC-1447-12-2012 (*affirmed*).]

Reported by Najib Tamby F

JUDGMENT

Zaharah Ibrahim JCA:

Introduction

[1] This was an appeal against the decision of the High Court in Malaya at Kuala Lumpur dismissing the appellant's claim for a sum equivalent to €162,373.50 which the appellant claimed had been paid out of the EURO Foreign Currency Account maintained by the respondents with the appellant on behalf of the respondents' client. G

[2] In this judgment, the appellant and the respondents are referred to as the plaintiff and defendants, respectively. H

Background Facts

[3] The background facts set out below are summarised from the pleadings, the statements of agreed facts, the summary of the plaintiff's case and the summary of the defendants' case. I

- A [4] The plaintiff was a bank licensed under the Banking and Financial Institutions Act 1989.
- [5] The defendants were, at the material time, practising as advocates and solicitors in a legal firm with the name and style “Tetuan Kang & Kang”.
- B [6] At the request of the defendants, the plaintiff agreed, on or about 9 February 2012, to grant, and the defendants agreed to open, manage and maintain, a EURO Foreign Currency Account, being FCA Account Number 714721-002427 (“FCA account”), for and on behalf of the defendants’ client, ACC International FZE in the United Arab Emirates (“ACC”).
- C [7] On 28 June 2012, on the defendants’ instructions, the plaintiff transferred the sum of €162,373 (which was equivalent to RM639,787.83 on that date) from the FCA account to a company, known as “Emdad Company” (“Emdad”), based in Abu Dhabi, through the Hong Kong & Shanghai Bank operating in Abu Dhabi, United Arab Emirates.
- D [8] The transacted amount was not debited from the FCA account.
- [9] Between 28 June 2012 and 14 August 2012, the defendants made a number of transactions through the FCA account.
- E [10] On 11 September 2012, the plaintiff was informed by the Foreign RS Unit of Finance and Treasury Operations at its head office of the non-debit.
- [11] On 12 September 2012 the plaintiff informed the defendants of the matter.
- F [12] On 13 September 2012 the defendants asked for particulars. On the same date the plaintiff furnished the requested particulars and demanded that the defendants refund the overdrawn sum on or before 20 September 2012. The defendants failed to make the refund.
- G [13] On 4 October 2012 the plaintiff, through its solicitors, sent a notice of demand to the defendants, demanding that the defendants credit the overdrawn amount into the account by 6pm on 12 October 2012.
- [14] When the defendants failed to credit the demanded amount, the plaintiff commenced this suit against the defendants at the High Court in Kuala Lumpur.
- H **In The High Court**
- The Plaintiff’s Claim*
- I [15] In its amended statement of claim, the plaintiff stated that its claim against the defendants for the sum of €162,373.50 was based on the tort of conversion or, alternatively, as money had and received.

[16] The plaintiff also claimed for interest at 5% per annum from the date the cause of action arose until the date of judgement based on s. 11 of the Civil Law Act 1956 and O. 42 r. 12 of the Rules of Court 2012.

A

The Defendants' Defence

[17] In their defence the defendants claimed that the plaintiff knew at all material times that the FCA account was opened by the defendants for and on behalf of their client, ACC. It was opened as "Kang & Kang's (client account)", a dedicated client's account. The defendants claimed to be trustees of the account and to be the disclosed agents of ACC.

B

[18] The defendants claimed that the plaintiff had voluntarily remitted to Emdad the sum now claimed by it from the defendants, and knew that the money was not sent to the defendants nor received by the defendants.

C

[19] The defendants further claimed that the plaintiff had waived its rights to claim the overdrawn sum as the plaintiff had, in four successive months since the date of the remittance of the sum claimed, issued to the defendants statements on the FCA account which did not indicate any problem.

D

[20] The defendants also claimed, *inter alia*, that the plaintiff had failed to mitigate its losses, had breached its fiduciary duty, and was negligent.

Issues In The High Court

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[21] We noted that despite the amended statement of claim stating only conversion and money had and received as the causes of action for the plaintiff's claim, the statement on agreed issues to be tried filed by solicitors for the plaintiff set out the following issues as issues to be tried:

Claim on the Basis of Mistake of Fact

F

1. Whether monies amounting to EURO162,373.00 (equivalent to RM639,787.83 as at 28.06.2012) ["the Amount"] in the Defendant's (as defined in the Statement of Claim) account, not debited from the FCA Account and/or inadvertently paid to the Defendant by the Plaintiff, can be reclaimed on the basis of mistake of fact.

G

Claim on the Basis of Tort of Conversion

2. Whether the Defendant wrongfully converted the Amount to the use of the Defendant or any third parties and failed to deliver up the Amount when demanded.

H

Claim on the Basis of Monies Had and Received

3. Whether the Defendant is liable to pay the Amount to the Plaintiff on the basis of monies had and received.

Claim for Interest

I

- A 4. Whether the Defendant is liable to pay interest at the rate of 5% per annum from the date the cause of action arose until date of full settlement of the Amount.

Defence of Trusteeship

- B 5. Whether the fact that the Defendant is a Trustee or a Disclosed Agent of the FCA Account (as defined in the Statement of Claim) negates the Defendant's liability on any of the grounds of claim above.

Defence of Estoppel

- C 6. Whether the defence of estoppel applies to negate the Defendant's liability on any of the grounds above.

Defence of Negligence and Breach of Fiduciary Duty

7. Whether the Plaintiff owes any duty to the Defendant. ("the Duty")
- D 8. Whether the Plaintiff is negligent and/or in breach of the Duty and it negates the Defendant's liability on any of the grounds above.

Defence of Waiver

9. Whether the Plaintiff has waived its rights to claim against the Defendant on any of the abovementioned grounds.

E

Mitigation as a Defence

10. Whether the Plaintiff failed to mitigate its losses.

Quantum

- F 11. Whether the Plaintiff is able to prove the amount as pleaded.

Decision Of The Trial Judge

[22] The learned trial judge dealt with the issues by grouping them into the following:

- G (i) mistake;
 (ii) conversion;
 (iii) money had and received;
 (iv) trustee/disclosed agent;
- H (v) estoppel, waiver and rectification.

Mistake

- [23]** On the issue of mistake of fact, the learned trial judge held that there was no mutual mistake rendering the FCA void under s. 21 of the Contracts Act 1950. The Court of Appeal case of *Soon Lee Huat Palm Oil Mill Sdn Bhd v. Stable Win Sdn Bhd* [2013] 4 CLJ 640; [2015] 4 MLJ 374 was referred to and followed.
- I

[24] The learned trial judge also held that, unlike in the case of *Borneo Motors (S) Pte Ltd v. William Jacks & Company (S) Pte Ltd* [1992] SGCA 47 relied upon by the plaintiff, the plaintiff's own pleadings lacked particulars of the mistake and the evidence led by the plaintiff did not explain who made the mistake and why the FCA account was not debited on the very day (28 June 2012) that the plaintiff transferred the sum of €162,373 to Emdad. PW1 gave evidence that debiting the account with the sum transferred would have been done in the normal course of business. The plaintiff claimed that the mistake was only realised when their head office discovered it, but no evidence was led to show that this was what transpired.

[25] The learned trial judge therefore held that the plaintiff had failed to discharge its burden of establishing the "mistake of fact" that it claimed was made in not debiting the sum transferred to Emdad.

Conversion

[26] On the issue of conversion, the learned trial judge held that the tort of conversion only applied to goods and chattels – not to money in a banking account. The learned trial judge referred to and followed the decisions in *Syarikat Bekalan Air Selangor Sdn Bhd v. Liew Lai Yin* [2010] 5 CLJ 222; [2010] 3 MLJ 76 and in *Noel Kenneth Davidson v. Firm Corporation Sdn Bhd* [1994] 2 CLJ 637; [1994] 2 MLJ and the House of Lords' decision in *OBG Ltd v. Alan* [2007] UKHL 21.

[27] The learned trial judge noted that the transfer of the funds from the FCA account was done by the plaintiff itself.

[28] At the time of the transfer of the sum of €162,373 to Emdad on 28 June 2012, there were in fact sufficient funds belonging to ACC in the FCA account. This was confirmed by PW1. The learned trial judge was of the view that as it was the transfer on 28 June 2012 that formed the basis for the claim of conversion, and that as the plaintiff's claim was for the refund of the amount transferred on that date, the other transactions made after that transfer were not in issue.

[29] The learned trial judge therefore concluded that there was no conversion of the funds in the FCA account.

Money Had And Received

[30] The learned trial judge explained in her judgement that the plaintiff's counsel had explained by way of clarification that the plaintiff's real complaint was that payment had been made by mistake and therefore what was sought was the restitution of that money mistakenly paid. The plaintiff had relied on s. 73 of the Contracts Act 1950.

- A [31] The learned trial judge found that s. 73 did not apply to the facts of this case as it was not in dispute that the amount transferred from the FCA account on 28 June 2012 was transferred to a third party. As the FCA account was a dedicated client's account and the money was transferred to a third party, the defendants were not the persons to whom the money was paid or delivered.
- B

- [32] The learned trial judge referred to the case of *Bank Bumiputra Malaysia v. Hashbudin b. Hashim* [1998] 2 CLJ Supp 332; [1998] 3 MLJ 268 and 269 which discussed the circumstances under which s. 73 of the Contracts Act 1950 would apply. The learned trial judge found that when the amount of €162,373 was transferred out of the FCA account, it was not transferred out under mistake or coercion.
- C

Trustee/Disclosed Agent

- [33] The learned trial judge found that the plaintiff did not dispute that the FCA account was a client's account and therefore a trust account. Consequently, said the learned trial judge, the defendants administered the account as trustees of the account. The learned trial judge found that the plaintiff had failed to prove the defendants' liability in this case.
- D

Estoppel, Waiver And Rectification

- E [34] On the issue of estoppel, the learned trial judge found that the plaintiff had continued to allow five subsequent transactions to be made from that same FCA account subsequent to the impugned transaction, and even after this suit was filed. The plaintiff had issued statements which showed that the account was in good order.
- F

- [35] The learned trial judge held that the conclusive evidence provision in cl. 9 of the plaintiff's Regulations: Terms and Conditions for Master Foreign Currency Current Account applied. That clause provided that a bank statement in respect of any account would be conclusive evidence of the transactions, entries and balances in that account as against the client unless the client notifies the plaintiff of any errors, discrepancies, claims or unauthorised debits or items in the statement within 21 days from the date of the statement. According to the learned trial judge, estoppel applied as against the plaintiff.
- G

- H [36] The learned trial judge also found that by the plaintiff's acts in permitting the five subsequent transactions, and in issuing the bank statements showing the account to be in good order, the plaintiff had in fact ratified the mistake and had waived the repayment of the amount not debited.

- I [37] The learned trial judge found that the estoppel, ratification and waiver operated as "effective bars" against the plaintiff's claim for restitution.

High Court Order

A

[38] Based on Her Ladyship's findings as summarised above, the learned trial judge concluded that the plaintiff had failed to prove its claims against the defendants on balance of probabilities and dismissed the claim with costs of RM50,000.

B

[39] The plaintiff appealed to this court.

In The Court Of Appeal

[40] Before us, the plaintiff in its submissions dealt with the following grounds:

C

(i) on the issue of mistake, that the learned trial judge erred when Her Ladyship found there was lack of evidence to show that there was mistake as there was oral and documentary evidence to show that there was mistake; and the defendants must not be allowed to take advantage of the plaintiff's mistake;

D

(ii) the learned trial judge failed to appreciate that the statements did not show the deductions, and the mistake was only discovered 2 1/2 months later, and therefore those statements could not be used as a basis for the finding of estoppel, waiver and rectification against the plaintiff;

E

(iii) the learned trial judge erred in her finding that the tort of conversion did not apply to monies in a banking account as the Court of Appeal in *Oriental Bank of Malaya v. Rubber Industry* [1957] 23 MLJ 153 had decided otherwise.

F

[41] Having read the record of appeal and read the submissions of the plaintiff both at the High Court and before us, and heard the oral submissions before us, we concluded that the mistake that was the basis for the plaintiff's claim was not the mistake envisaged by s. 21 of the Contracts Act 1950.

G

[42] It was abundantly clear to us that in paras. 4 until 15 of its amended statement of claim (in which are set out the details of the alleged mistake in not debiting the FCA account) the plaintiff was merely setting out the facts forming the basis for its claim. The mistake set out in the amended statement of claim was the non-debiting of the FCA account. It was not a mistake as to the subject-matter of the agreement by or pursuant to which the FCA account was opened or as to any term of the agreement.

H

[43] The plaintiff's claim was clearly and explicitly based on the tort of conversion or, alternatively, for money had and received resulting from a mistake made by it. This can be seen from section C (para. 16) and section D (paras. 17, 18 and 19) of the amended statement of claim.

I

A [44] Hence, in our considered view, there were only two issues that needed to be determined:

(1) whether the plaintiff had proven that the defendants had committed the tort of conversion of the sum of €162,373 which it did not debit from the FCA account upon such sum being transferred out of the account on 28 June 2012;

B (2) whether the plaintiff was entitled to claim from the defendants the sum of €162,373 or its equivalent in ringgit as money had and received.

Analysis

C (1) *Tort Of Conversion*

[45] The plaintiff relied on this tort as its main cause of action against the defendants in its amended statement of claim and in the High Court.

D Does the tort of conversion apply to money transferred out of an account?

[46] According to the plaintiff in its submissions before us, the decision of the Court of Appeal (Federation of Malaya) in the case of *Oriental Bank of Malaya v. Rubber Industry (Replanting) Board* [1957] 1 LNS 50; [1957] 23 MLJ 153 supported its contention that the tort of conversion applied also to moneys held in a banking account. The following passages in that judgment were quoted before us:

Arnold & Ors. v. The Cheque Bank is authority for the statement that the owner is entitled to institute or maintain a claim for damages for conversion of a cheque.

F ... it has been aptly stated by the Earl of Halsbury in *Great Western Railway v. London County Banking Co.*:

... the supposed distinction between the title to the cheque and the title to the money obtained or represented by it seems to me to be absolutely illusory.

G [47] We had read the full judgment in the *Oriental Bank* case. In our view that case had nothing to do with money in a banking account as such. In that case a cheque was issued by the respondents in favour of Kok Ann Rubber Estate. The cheque came into the hands of an unauthorised person. A person by the name of Lee Man Choi opened an account in the name of “Kok Ann Rubber Estate” using that cheque. He claimed to be the sole proprietor of that Kok Ann Rubber Estate. The respondents claimed for damages. The Court of Appeal in that case held that the respondents could maintain an action for the conversion of the cheque.

I

[48] It was clear that in the *Oriental Bank* case the Court of Appeal (Federation of Malaya), after referring to the decision of the Court of Appeal (Straits Settlement) in *Official Assignee etc v. Overseas Chinese Bank* [1934] 1 LNS 77; [1934] MLJ 76, accepted that a cheque (a physical item) is a chattel, its value being the value attached to it. A

[49] In the case before us, the “thing” that was said by the plaintiff to have been converted by the defendants was the amount that was transferred to Emdad on 28 June 2012 by electronic means but which the plaintiff failed to debit from the FCA account. B

[50] The learned trial judge, particularly after referring to the judgment of the House of Lords in *OBG Limited and others (Appellants) v. Allan and others (Respondents)* as reported in [2007] UKHL 21, came to the conclusion that the tort of conversion applied only to goods/chattels and not to the subject matter of the plaintiff’s claim. C

[51] The majority of the House of Lords in *OBG Limited* held that the tort of conversion only applied to the misappropriation of chattels. They declined to extend the scope of the tort to choses in action or to the misappropriation of intangibles. D

[52] From the authorities referred to us and at the High Court, the position on the tort for conversion as decided in *OBG Limited* was still the applicable legal position at the material time. We had no reason therefore to disagree with the learned trial judge’s finding that the tort of conversion did not apply to a claim against the defendants for the amount that the plaintiff failed to debit from the FCA account. E

Did The Defendants Convert The Sum Of €162,373? F

[53] It was the plaintiff’s contention in para. 9 of its amended statement of claim that the transfer out of the sum of €162,373 and the failure on its part to debit the FCA account with the equivalent amount constituted “overcrediting of the account”. G

[54] It was not in dispute, as admitted by PW1 in cross-examination, that at the time of the transfer of the sum of €162,373, the FCA account was still in credit. The funds were sufficient for the transfer to be effected.

[55] The plaintiff claimed that after the money had been transferred, the defendants continued to issue instructions for the transfer of further amounts (totalling €219,441.81) from the FCA account between 9 July 2012 and 14 August 2012. Impliedly, it was the subsequent transfers that caused the FCA account to be overdrawn. Yet, as correctly pointed out by the learned trial judge, the subject matter of the plaintiff’s claim for conversion was the sum of €162,373, not the sums involved in the subsequent transfers; and the effective date of the alleged conversion was 28 February 2012. H I

A [56] We noted that nowhere in the amended statement of claim or in any of the other pleadings was the initial amount in the FCA account stated. We noted also that nowhere was it stated at what point the FCA account became overdrawn, and by how much.

B [57] We therefore agreed with the learned trial judge that the plaintiff had failed to prove that the defendants “had dealt with the plaintiff’s property” (being the sum of €62,373) “in a manner inconsistent with the plaintiff’s rights”.

Money Had And Received

C [58] Relying on the case of *Borneo Motors (supra)*, the plaintiff submitted before us that “as long (as) there is a mistake, that is sufficient – and – the law does not punish the payer for their negligence or carelessness”.

D [59] However, in *Borneo Motors*, the mistake of fact related to the covenant in cl. 4(4) of the agreement between the parties, that the plaintiffs would pay the defendant for electricity supplied should a meter be installed by the Public Utilities Board. The plaintiff made payments to the defendant under the mistaken belief that such a meter was installed. In other words, there was first a mistake as to the existence of a covenanted fact, and that mistake resulted in payments being made. The negligence or carelessness attributable to the plaintiff was in not verifying whether there was such installation.

E [60] In the case before us, there was no such mistake of fact. There was just mere carelessness/negligence. The sum of €162,373 was transferred to Emdad when there were sufficient funds in the FCA account. There was no mistake there. The subsequent payments were not the subject matter of the claim.

F [61] It was not in dispute that the FCA account was a client’s account. This was in fact admitted in para. 5 of the amended statement of claim. It was therefore clear that the party receiving the sum of €162,373, or the benefit/ advantage from the transfer of that sum, was not the defendants.

G [62] We were of the considered view that s. 71 of the Contracts Act 1950 did not apply. We also agreed with the learned trial judge that on the facts of this case, s. 73 of the Contracts Act 1950 did not apply.

H [63] We therefore agreed with the learned trial judge that the claim for money had and received could not stand against the defendants.

Decision

I [64] For the reasons set out above, we dismissed the appeal with costs and affirmed the order of the High Court.